A **ABDUL RASHID MAIDIN & ORS**

v.

LIAN MONG YEE

B COURT OF APPEAL, PUTRAJAYA
ABDUL AZIZ MOHAMAD JCA
HASHIM YUSOFF JCA
ZULKEFLI MAKINUDIN JCA
[CIVIL APPEAL NO: W-02-4-2005]
C 18 SEPTEMBER 2007

CIVIL PROCEDURE: *Functus officio - Summons-in-chambers' application - Issue raised - Whether tried and determined in earlier originating summons - Whether application misconceived and defective*

D ***CIVIL PROCEDURE:*** *Summons-in-chambers - Application - Issue raised - Whether tried and determined in earlier originating summons - Whether application misconceived and defective*

CIVIL PROCEDURE: *Originating summons - Application to convert*
E *originating summons into writ action - Whether court has jurisdiction*

The respondent herein (the 'defendant' hereinafter) filed an action ('the D1 Action') against the appellants herein (the 'plaintiffs' hereinafter) at the Kuala Lumpur High Court claiming *inter alia*
F specific performance of an agreement, alternatively a refund of the sum of RM7.5 million paid by him and damages. On the day of the trial, a consent judgment was recorded whereby the plaintiffs agreed to pay the defendant the sum of RM32.1 million in full and final settlement. It was a term of the consent judgment that
G the defendant write to the relevant authorities for permission to withdraw the complaints and police reports lodged by him against the plaintiffs. Pursuant to the consent judgment, the defendant only received payment of the sum of RM5.1 million and the plaintiffs defaulted in paying the balance sum. Upon the plaintiff's
H default, the defendant commenced bankruptcy and winding-up proceedings against the plaintiffs. Subsequently the plaintiffs filed an originating summons ('OS') in the Shah Alam High Court against the defendant to set aside the consent judgment on the grounds that it amounted to an illegal agreement to stifle
I prosecution. That allegation was based on the term relating to the police reports in the consent judgment. The plaintiffs succeeded in the OS and the court ordered the consent judgment be set aside,

the D1 Action be transferred to the Shah Alam High Court and the sum of RM5.1 million be paid into court. The defendant appealed to the Court of Appeal. The Court of Appeal affirmed the order of the setting aside of the consent judgment on the grounds that it amounted to an illegal agreement to stifle prosecution. However, it set aside the other consequential orders made by the High Court judge including the order for transfer of the D1 Action to the Shah Alam High Court and the order for the payment of RM5.1 million into court. The defendant applied to the Federal Court for leave to appeal against part of the decision of the Court of Appeal but that was dismissed. Upon the plaintiffs' application, the learned judge of the Shah Alam High Court made an order that the live issue in the OS should be decided by the Kuala Lumpur High Court in the D1 Action and that the OS be transferred to the D1 Action. The plaintiffs then applied by way of a summons-in-chambers at the Kuala Lumpur High Court for orders *inter alia* that there were still live issues to be determined in the OS and that the OS be consolidated with the D1 Action. Also, for the conversion of the OS into a writ action. The learned judge dismissed the plaintiffs' application. Hence, the plaintiffs' appeal to this court.

Held (dismissing the appeal)
Per Zulkefli Ahmad Makinudin JCA delivering the judgment of the court:

(1) The so-called "live" issue to be determined and tried as contended by the plaintiffs related to their claim for the sum of RM5.1 million which was paid to the defendant pursuant to the consent judgment which was set aside by the Shah Alam High Court on 17 April 1998. The High Court ought to have denied the plaintiffs' prayer for the refund of the RM5.1 million on two grounds. Firstly, the plaintiffs had simply failed to prove that it was paid under coercion. Secondly, the parties were in *pari delicto* and the loss must lie where it fell and the court ought not to have assisted any party to the illegal agreement. Further, the plaintiffs' application by way of summons-in-chambers on 22 April 2004 was misconceived and defective. By then the High Court in the OS was *functus officio* upon making the final order dated 17 April 1998 on the conclusion of the hearing of the OS since the order had already been drawn up and perfected. It was also noted that the Court of Appeal had set aside that part of the order of

A the High Court relating to the RM5.1 million on the additional grounds that the parties were in *pari delicto*. It amounted to a decision by the Court of Appeal that the sum was to remain with the defendant. There was therefore no longer any live issue relating to that sum in the OS. (paras 4 & 5)

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(2) After a judge has made a final order that has been perfected, he is *functus officio* and has no jurisdiction to amend or vary his order or re-hear the issues, save under the slip rule or where the order can be said to be a nullity. Further, an action C filed by way of an originating summons is an originating process while a summons-in-chambers is a subsidiary process that draws its life from the originating process. In the present case, when the originating process was fully heard and finally disposed of, the cause of action was extinguished. No further D application of a fresh and substantial nature might be made by the plaintiffs by way of a summons-in-chambers save those specifically permitted or directed by the original orders of the court. (para 6)

E **(3)** The High Court had no jurisdiction to order the conversion of the OS into a writ action after the OS had been finally disposed of and the appeal against the order of the High Court also finally disposed of by the Court of Appeal. (para 6)

F ***Bahasa Malaysia*** *Translation Of Headnotes*

Responden di sini ('defendan' selepas ini) telah memfail satu tindakan ('Tindakan D1') terhadap perayu-perayu di sini ('plaintif-plaintif' selepas ini) di Mahkamah Tinggi Kuala Lumpur menuntut, G antara lain, pelaksanaan spesifik perjanjian, atau pengembalian sejumlah RM7.5 juta yang telah dibayar olehnya beserta gantirugi. Di hari perbicaraan, suatu penghakiman persetujuan telah direkodkan di mana plaintif-plaintif bersetuju untuk membayar defendan sejumlah RM32.1 juta sebagai penyelesaian penuh dan H muktamad. Menjadi satu terma penghakiman persetujuan bahawa defendan akan menulis kepada pihakberkuasa-pihakberkuasa relevan untuk kebenaran menarik balik bantahan serta laporan-laporan polis yang dibuatnya terhadap plaintif-plaintif. Ekoran penghakiman persetujuan, defendan bagaimanapun hanya dibayar I sebanyak RM5.1 juta dan plaintif-plaintif ingkar membayar bakinya. Akibatnya, defendan memulakan prosiding kebankrapan terhadap plaintif-plaintif. Berikutnya, plaintif-plaintif memfail saman pemula

('OS') di Mahkamah Tinggi Shah Alam terhadap defendan bagi mengenepikan penghakiman persetujuan atas alasan bahawa ia merupakan satu perjanjian tak sah untuk menggagalkan pendakwaan. Pengataan ini diasaskan kepada terma berkaitan laporan polis di dalam penghakiman persetujuan. Plaintif-plaintif berjaya di dalam OS dan mahkamah memerintahkan supaya penghakiman persetujuan diketepikan, tindakan D1 dipindahkan ke Mahkamah Tinggi Shah Alam dan jumlah RM5.1 juta dibayar ke dalam mahkamah. Defendan merayu ke Mahkamah Rayuan. Mahkamah Rayuan mengesahkan perintah pengenepian penghakiman persetujuan atas alasan bahawa ia adalah suatu perjanjian yang tak sah kerana bertujuan untuk menumpaskan pendakwaan. Mahkamah Rayuan, bagaimanapun, mengenepikan perintah-perintah lanjutan yang dibuat oleh hakim Mahkamah Tinggi termasuk perintah memindahkan tindakan D1 ke Mahkamah Tinggi Shah Alam serta perintah bagi pembayaran RM5.1 juta ke dalam mahkamah. Defendan memohon ke Mahkamah Persekutuan untuk kebenaran merayu terhadap sebahagian keputusan Mahkamah Rayuan tetapi permohonannya ditolak. Ekoran permohonan plaintif-plaintif, Yang Arif Hakim Mahkamah Tinggi di Shah Alam telah membuat perintah bahawa isu hidup di dalam OS harus diputuskan oleh Mahkamah Tinggi Kuala Lumpur di dalam Tindakan D1 dan bahawa OS dipindahkan ke Tindakan D1. Plaintif-plaintif kemudian memohon, melalui saman-dalam-kamar di Mahkamah Tinggi Kuala Lumpur, untuk perintah, antara lain, bahawa masih terdapat isu-isu hidup yang perlu diputuskan di dalam OS dan bahawa OS hendaklah disatukan dengan Tindakan D1. Juga dipohon supaya OS ditukar menjadi satu tindakan writ. Yang Arif Hakim menolak permohonan plaintif-plaintif. Plaintif-plaintif dengan itu merayu ke mahkamah ini.

Diputuskan (menolak rayuan)

Oleh Zulkefli Ahmad Makinudin HMR menyampaikan penghakiman mahkamah:

(1) Apa yang dipanggil isu "hidup" yang harus dibicara dan diputuskan seperti yang dihujahkan oleh plaintif-plaintif itu adalah berkait dengan jumlah RM5.1 juta yang dibayar kepada defendan di bawah penghakiman persetujuan yang telah diketepikan oleh Mahkamah Tinggi Shah Alam pada 17 April 1998. Mahkamah Tinggi sepatutnya menolak permohonan plaintif-plaintif untuk pengembalian RM5.1 juta atas dua sebab. Pertama, plaintif-plaintiff jelas gagal membuktikan bahawa ia dibayar melalui paksaan. Kedua, pihak-pihak berada dalam *pari*

delicto dan dengan itu kerugian harus ditanggung di mana ia terjadi, sementara mahkamah pula tidak harus membantu mana-mana pihak kepada perjanjian tak sah tersebut. Selain itu, permohonan plaintif-plaintif melalui saman-dalam-kamar pada 22 April 2004 adalah terpesong dan cacat. Pada waktu itu, Mahkamah Tinggi di dalam OS sudah pun *functus officio* setelah membuat perintah muktamad bertarikh 17 April 1998 di akhir pendengaran OS disebabkan perintah telah dirangka dan disempurnakan. Harus juga diperhatikan bahawa Mahkamah Rayuan telah mengenepikan bahagian perintah Mahkamah Tinggi yang berkaitan dengan RM5.1 juta atas alasan tambahan bahawa pihak-pihak berada dalam keadaan *pari delicto*. Ia adalah keputusan Mahkamah Rayuan bahawa jumlah itu harus terus berada dengan defendan. Oleh itu tidak ada lagi isu hidup berhubung jumlah tersebut di dalam OS.

(2) Apabila seseorang hakim membuat satu perintah muktamad yang telah disempurnakan, maka beliau menjadi *functus officio* dan tidak berbidangkuasa untuk meminda atau mengubah perintahnya atau mendengar semula isu-isu, kecuali di bawah kaedah tidak sengaja atau di mana perintah adalah suatu nullity. Juga, suatu tindakan yang difail melalui cara saman pemula adalah satu proses pemula sementara saman-dalam-kamar adalah satu proses subsidiari yang berdiri di atas proses pemula. Dalam kes semasa, apabila proses pemula didengar sepenuhnya dan diputuskan secara muktamad, ia telah memadamkan kausa tindakan. Tiada permohonan lanjut yang baru dan substantif boleh dibuat oleh plaintif-plaintif melalui saman-dalam-kamar kecuali apa yang secara khusus dibenarkan atau diarahkan oleh perintah-perintah asal mahkamah.

(3) Mahkamah Tinggi tidak berbidangkuasa untuk memerintahkan penukaran OS kepada tindakan writ selepas OS telah dilupuskan dengan muktamadnya dan rayuan terhadap perintah Mahkamah Tinggi juga telah dilupuskan dengan muktamadnya oleh Mahkamah Rayuan.

Case(s) referred to:

Gai Hin Refrigeration Sdn Bhd v. Kamanis Holdings Sdn Bhd [2004] 4 CLJ 232 CA ***(refd)***

Hengwell Development Pte Ltd v. Thing Chiang Ching [2003] 3 SLR 84 ***(refd)***

For the appellants - KS Narayanan (A Vishnu Kumar with him); M/s KS Narayanan & Assoc
For the respondent - K Ananthan (CL Wong with him); M/s Skrine

[Appeal from High Court, Shah Alam; Originating Summons No: MT1-24-786-97]

Reported by Usha Thiagarajah

JUDGMENT

Zulkefli Makinudin JCA:

Introduction

[1] This is an appeal by the plaintiffs against the decision of the High Court at Kuala Lumpur in dismissing the plaintiffs' application filed by way of summons-in-chambers dated 22 April 2004 wherein the plaintiffs had sought the following orders:

(1) that there are live issues to be determined and tried in the Shah Alam High Court Originating Summons No. MT1-24-786-97.

(2) the Shah Alam High Court Originating Summons No. MT1-24-786-97 be consolidated and/or heard and tried together with Kuala Lumpur High Court Suit No. D1-22-16-96.

(3) that upon and in the event this Honourable Court grants prayers 1 and 2 above, the following consequential orders be granted:

(a) the originating summons in the Shah Alam High Court Originating Summons No. MT1-24-786-97 be converted into a writ action;

(b) that the two affidavits in the said Shah Alam High Court Originating Summons No. MT1-24-786-97 namely the affidavit of Abdul Rashid bin Maidin affirmed on 19 December 1997 and the affidavit of Lian Mong Yee affirmed on 7 January 1998, shall stand as pleadings whereby the affidavit of Abdul Rashid bin Maidin affirmed on 19 December 1997 shall stand as statement of claim and the affidavit of Lian Mong Yee affirmed on 7 January 1998 shall stand as defence; and

(c) the documents annexed and enclosed in the affidavit of Abdul Rashid bin Maidin affirmed on 19 December 1997 and the affidavit of Lian Mong Yee affirmed on 7 January 1998 of the said Shah Alam High Court Originating Summons No. MT1-24-786-97, shall respectively stand as the plaintiffs' bundle of documents and the defendant's bundle of documents.

(4) costs in the cause.

(5) such further and other orders, directions and relief as this Honourable Court deems fit and just.

Background Facts

[2] The relevant background facts of the case which are not disputed by the plaintiffs and the defendant are as follows:

(1) The defendant filed an action against the plaintiffs in Suit No. D1-22-16-1996 in the Kuala Lumpur High Court ("the D1 Action") claiming *inter alia* specific performance of an agreement dated 20 October 1995, alternatively, a refund of the sum of RM7.5 million paid by him and damages.

(2) The D1 Action was fixed for trial on 15 October 1996. On that day, a consent judgment was recorded whereby the plaintiffs agreed to pay the defendant the sum of RM32.1 million in full and final settlement. It was a term of the consent judgment that the defendant will write to the relevant authorities for permission to withdraw the complaints and police reports lodged by him against the plaintiffs or some of them ("the term relating to the police reports").

(3) Pursuant to the consent judgment, the defendant only received payment of the sum of RM5.1 million and the plaintiffs thereafter defaulted in making payment of the balance sum.

(4) Upon the plaintiffs' default, the defendant commenced bankruptcy and winding-up proceedings against the plaintiffs.

(5) In December 1997, the plaintiffs filed an originating summons ("OS") in the Shah Alam High Court *vide* Originating Summons No. MT1-24-786-1997 ("the Shah Alam OS") against the defendant to set aside the consent judgment on

the grounds that it amounted to an illegal agreement to stifle prosecution. That allegation was based on the terms relating to the police reports in the consent judgment.

(6) The prayers in the Shah Alam OS were as follows:

(a) that the consent judgment in the D1 Action be set aside;

(b) that the D1 Action be transferred to the Shah Alam High Court for trial;

(c) that all execution proceedings by the defendant be set aside; and

(d) that the payment of RM5.1 million paid pursuant to the consent judgment be deposited into court or repaid to the plaintiffs.

(7) The plaintiffs succeeded in the Shah Alam OS and obtained orders in terms of the OS on 17 April 1998. The court ordered that the consent judgment be set aside, the D1 Action be transferred to the Shah Alam High Court and the sum of RM5.1 million be paid into court.

(8) Upon appeal by the defendant to the Court of Appeal, the Court of Appeal on 20 August 2000 affirmed the order of the setting aside of the consent judgment on the grounds that it amounted to an illegal agreement to stifle prosecution but set aside the other consequential orders made by the learned High Court Judge, including the order for transfer of the D1 Action to the Shah Alam High Court and the order for the payment of the RM5.1 million into the Shah Alam High Court.

(9) The defendant's application to the Federal Court for leave to appeal against part of the decision of the Court of Appeal was refused by the Federal Court.

(10) Upon an application by the plaintiffs, the learned judge of the High Court at Shah Alam on 28 October 2002 made an order that whether there was a live issue or not in the Shah Alam OS should be decided by the Kuala Lumpur High Court in the D1 Action and that the Shah Alam OS be transferred to the D1 Action. It was further ordered that the

Shah Alam High Court shall administratively transfer the Shah Alam OS to the Registry of the Kuala Lumpur High Court Commercial No. 1.

(11) Thereafter, on 22 April 2004, the plaintiffs filed a summons-in-chambers in the Shah Alam OS for orders *inter alia* that there are still live issues to be determined and tried in the Shah Alam OS, that the Shah Alam OS be consolidated and tried together with the D1 Action and for the conversion of the Shah Alam OS into a writ action ("the plaintiffs' application").

(12) The plaintiffs' application was dismissed with costs by the learned judge in the D1 Action on 24 November 2004 after hearing submissions. The plaintiffs now appeal to this court against the decision of the learned judge in the Dl action.

Decision On Appeal

[3] We heard the appeal by the plaintiffs on 11 October 2005 and we dismissed it. We now give the reasons for our decision as follows:

[4] The so-called 'live' issue to be determined and tried as contended by the plaintiffs relates to their claim for the sum of RM5.1 million which was paid to the defendant pursuant to the consent judgment which was set aside by the Shah Alam High Court on 17 April 1998. We noted that in the Shah Alam OS, learned counsel for the defendant had submitted that even if the consent judgment amounted to an illegal agreement, the parties were in *pari delicto* and the loss must lie where it falls and the plaintiffs were not entitled to any refund of the RM5.1 million. (See p. 193 of appeal record). However, the learned judge in the Shah Alam OS held in his judgment that pursuant to s. 73 of the Contracts Act, what was required to be shown was the presence of coercion in a general sense. His Lordship amongst others held that the RM5.1 million was paid pursuant to an agreement which was found to be stifling prosecution, the position of the parties was unequal and the parties were not in *pari delicto*. His Lordship accordingly ordered the RM5.1 million to be deposited into court pending the disposal of the D1 Action. It is pertinent to note on this point that in the Court of Appeal, Gopal Sri Ram, JCA in delivering the judgment of the court relating to this case had this to say on the issue of coercion:

However, that is not the case here. As I have pointed out during argument, there is nothing in the judge's judgment that finds such facts (on coercion). Indeed, respondents' counsel conceded that to be the case. As against that, there is the admission by the respondents that they asked for the term (relating to the police reports). There may have been coercion. There may not. It is not a matter upon which a finding can be made on mere affidavit evidence. I think there is much force in the appellant's argument that relief in respect of the repayment ought to have been denied at least on the ground that the respondents had not proved coercion within s. 73 of the Contracts Act. But I think that relief on this count should be denied on the additional ground also advanced by the appellant, namely, that the respondents were in *pari delicto*. The oppression and abject submission that was present in *Smith v. Cuff* is simply absent here. Accordingly, I come to the conclusion that so much of the judge's order that requires the appellant to pay the sum of RM5.1 million must be set aside. (See pages 222-223 of Appeal Record).

[5] We were of the view, based on the above observation made by the Court of Appeal, that the High Court in the Shah Alam OS ought to have denied the plaintiffs' prayer for the refund of the RM5.1 million on two grounds. Firstly, the plaintiffs had simply failed to prove that it was paid under coercion; and secondly, the parties were in *pari delicto* and the loss must lie where it fell and the court ought not to have assisted any party to the illegal agreement. It was also our judgment that the plaintiffs' application filed by way of summons-in-chambers on 22 April 2004 was misconceived and defective. We found that by then the High Court in the Shah Alam OS was *functus officio* upon making the final order dated 17 April 1998 on the conclusion of the hearing of the OS, since the order had already been drawn up and perfected. It is also to be noted that the Court of Appeal had set aside that part of the order of the High Court relating to the RM5.1 million on the additional ground that the parties were in *pari delicto*. It amounted to a decision by the Court of Appeal that the sum was to remain with the defendant. There was therefore no longer any live issue relating to that sum in the Shah Alam OS.

[6] It is trite law that after a judge has made a final order which has been perfected, he is *functus officio* and has no jurisdiction to amend or vary his order or re-hear the issues, save under the slip rule or where the order can be said to be a nullity. (See the case of *Gai Hin Refrigeration Sdn. Bhd. v. Kamanis Holdings Sdn. Bhd.*

A [2004] 4 CLJ 232). Furthermore we took the view that an action filed by way of an originating summons is an originating process, while a summons-in-chambers is a subsidiary process which draws its life from the originating process. In the context of the present case, when the originating process was fully heard and finally
B disposed of, the cause of action was extinguished and no further application of a fresh and substantial nature might be made by the plaintiffs by way of a summons-in-chambers save those specifically permitted or directed by the original orders of the court. (See the case of *Hengwell Development Pte Ltd v. Thing Chiang Ching* [2003]
C 3 SLR 84) It was equally clear that the High Court would in any event have no jurisdiction to order the conversion of the OS into a writ action after the OS had been finally disposed of and the appeal against the order of the High Court also finally disposed of by the Court of Appeal.

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Conclusion

[7] For the reasons stated we dismissed the plaintiffs' appeal with costs and made an order that the deposits be paid to the
E defendant to account of taxed costs.

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